

## Grounds of Law and Legal Theory: A Response

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# Grounds of Law and Legal Theory: A Response

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These responding reflections follow broadly the order of discussion in *Natural Law & Natural Rights* and *Aquinas: Moral, Political, and Legal Theory*, and often hark back to those and other previous efforts of mine. But I hope they also move things along a bit.

## I

In my first Oxford paper in legal and moral theory, delivered in debate with Philippa Foot,<sup>1</sup> I explored Aristotle's theory of central cases and focal meanings a little more fully than I did ten years later in *NLNR*. Hart had said, and had worked on the basis, that "the diverse range of cases of which the word 'law' is used are not linked by ... simple uniformity, but by less direct relations – often of analogy of either form or content to a central case."<sup>2</sup> He had referred us to Aristotle's discussion of the homonymy or, in its broad sense, "analogy" of *health*. But he had quite overlooked how Aristotle applies his concept of focal meaning to the concepts used in the philosophy of human affairs, concepts such as *citizenship*, *constitution (politeia)*, *political community (polis)* and *friendship*. I took up, as exemplary, Aristotle's discussions of friendship, both in the *Eudemian* (VII.2) and the *Nicomachean Ethics* (VIII.2), and searched out Aristotle's *reasons* for treating as central the friendship which finds lovable simply the friend, not simply the pleasure or the profit the relationship yields.<sup>3</sup> I summarized my exposition of those reasons:

Pleasure-seeking and business relationships can only be called friendships in so far as they preserve in a qualified form the objects directly and unreservedly [and therefore with stability] cultivated in friendship of the first [and central] category:

<sup>1</sup> On Foot's response to my paper, and her later far-reaching retreat from the position she was defending in those days, see Finnis, "Foundations of Practical Reason Revisited," *Am. J. Juris.* 50 (2006) 109-131 at 121 n. 24.

<sup>2</sup> H.L.A. Hart, *The Concept of Law [CL]* (1961), 79.

<sup>3</sup> Finnis, "Reason, Authority and Friendship in Law and Morals" in *Jowett Papers 1968-1969* (Oxford, Blackwell, 1970), 101-124 at 107-108.

mutual benevolence and aid and comfort, pleasant intercourse and like-mindedness.

Aristotle expresses this, *rather too starkly*, in the *Eudemian Ethics*, when he says that the focal meaning of a term concerns the thing the definition of which is implied in the definition of all the other things bearing the same name.

...Aristotle's point can perhaps be grasped by reflecting that friendship of the first category will ordinarily bring each friend pleasure and advantage for himself... though these pleasures and advantages are not what he seeks in the relationship. *So he can appreciate what it is to find pleasure and advantage in human communication; but the man who seeks only his own pleasure or advantage in such communication is not thereby enabled to appreciate what it is to love another for his own sake.*

Thus for Aristotle the central case of friendship is the friendship of the *spoudaioi*, the mature men who can reasonably find each other lovable simply as such; the central case of the *polis* is the *spoudaia polis*; and the definition of citizenship applies centrally to the *spoudaioi* who are citizens of the *spoudaia polis* (*Pol.* 1275a33, 1332a33).<sup>4</sup>

The last two sentences in that passage are re-articulated in the only discursive footnote in *NLNR*'s first chapter:

Behind Aristotle's cardinal principle of method in the study of human affairs – viz. that concepts are to be selected and employed substantially as they are used in practice by the *spoudaios* (the mature man of practical reasonableness)...-- lies Plato's argument (*Rep.* IX 582a-e; see also III 408d-409c) that the lover of wisdom can understand the concerns of men of other character, while the converse does not hold; in other words, the concerns and understanding of the mature and reasonable man provide a better *empirical* basis for the reflective account of human affairs...

So I agree with Veronica Rodriguez-Blanco that Aristotle's talk, in the *Eudemian Ethics*, of the central case's definition being found in the definition of the non-central cases misstates the relevant point. But nowadays I would go further and, as in my *Aquinas*

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<sup>4</sup> Ibid., 108-109 (emphases added).

book, give much more explicit methodological significance than I do in *NLNR* to the distinction, expounded in *NLNR* in connection with kinds of community,<sup>5</sup> between the four basic kinds of order and correspondingly the four irreducibly distinct kinds of method.

For the idea of central cases and focal meanings is itself an analogical idea. That is, we should expect the application and even the meaning of “central case” and “focal meaning” to shift as we move from (1) natural orders (physical and other natural sciences, metaphysics and so forth) to (2) logical orders (of thought bringing order into its own operations), to (3) the order of morally significant deliberation and action, and on fourthly (4) to the arts and techniques that bring order into matter beneath our control. We should expect the centrality of central cases in the natural and/or metaphysical sciences to be grounded in kinds of reasons (among them doubtless statistical frequency) notably different from the kinds of reasons that ground the centrality of central cases in the domain of self-shaping and community-shaping morally significant action.

But since human action, like human persons themselves, can often be worth studying not as the carrying out of self-shaping deliberation, free choice and execution of that choice but rather as an event in the natural world, or as an example or outcome of valid or invalid reasoning, or as a technological feat or fumble, we need to be alert to the theoretical purposes of the person carrying out a study of human affairs. That, I think, is why I headed my early article on these matters with an epigraph from Wittgenstein’s discussion of games – not the passages from sections 66 and 67 quoted by Veronica Rodriguez-Blanco but from section 69, where Wittgenstein is drawing conclusions from his reflections on games:

How should we explain to someone what a game is? I imagine that we should describe *games* to him, and we might add: ‘This *and similar things* are called ‘games’.’ And do we know any more about it ourselves? Is it only other people whom we cannot tell exactly what a game is? But this is not ignorance. We do not know the boundaries because none have been drawn. To repeat, we can draw

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<sup>5</sup> *NLNR*, 136-8. There I deliberately chose to make the technical order third in the list and the moral order fourth. But in subsequent writings I adhere to Aquinas’s order, expounded in the next paragraph below.

a boundary – for a special purpose. Does it take that to make a concept usable?

Not at all! (Except for that special purpose.)<sup>6</sup>

What interested me in that was the idea that the conceptual boundaries can't be drawn except by reference to some particular purpose, which I take to include particular theoretical purposes. That thought lies behind a good deal in *NLNR*. You see it in the reflections on p. 278, consequent on the offering of a definition of law on p. 276:

...one would be simply misunderstanding my conception of the nature and purpose of explanatory definitions of theoretical concepts if one supposed that my definition “ruled out as non-laws” laws which failed to meet, or meet fully, one or other of the elements of the definition. ... it would also be a misunderstanding to condemn the definition because [to quote Raz again] “it fails to explain correctly our ordinary concept of law which does allow for the possibility of laws of [an] objectionable kind”. For not only does my definition “allow for the possibility”; it also is not advanced with the intention of “explaining correctly our [sc. The ordinary man's] ordinary concept of law”. For the truth is that the “ordinary concept of law” (granting, but not admitting, that there is such a concept) is quite unfocussed. It is a concept which allows “us” to understand lawyers when they talk about sophisticated legal systems, and anthropologists when they talk about elementary legal systems, and tyrants and bandits when they talk about the orders and customs of their Syndicate, and theologians and moralists... There is no point in trying to explain a common-sense concept which takes its meanings from its very varied contexts

[which include, I might have added, purposes both of the speaker and those spoken of] and is well understood by everyone in those contexts. My purpose has not been to explain an unfocussed “ordinary concept” but to develop a concept for use in a theoretical explanation of a set of human actions, dispositions, interrelationships, and conceptions which (i) hang together as a set by virtue of their adaptation to a specifiable set of *human needs* considered in the light of empirical features of the human condition, and (ii) are accordingly found in very varying forms and with

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<sup>6</sup> Ludwig Wittgenstein, *Philosophical Investigations* trans. G.E.M. Anscombe (Oxford, Blackwell, 1953), sec. 69, quoted in Finnis, “Reason, Authority & Friendship...”, 100.

varying degrees of suitability for, and deliberate or unconscious divergence from, those *needs* as the fully reasonable person would assess them. To repeat: the intention has been not to explain a concept, but to develop a concept which would explain the various phenomena referred to (in an unfocussed way) by “ordinary” talk about law – and explain them by showing *how they answer* (fully or partially) *to the standing requirements of practical reasonableness* relevant to this broad area of human concern and interaction.<sup>7</sup>

A few pages earlier I had said, again with raised voice, in the context of the confused debate between Fuller and his critics:

As we have to stress again and again in an age of conceptual dogmatism, concepts of law and society are legitimately many, and their employment is subordinated to matters of principle rooted in the basic principles and requirements of practical reasonableness (which themselves generate many concepts and can be expressed in many reasonable forms).

And so, going back to the culmination of the discussion of central cases in chapter I, a chapter devoted, *unlike the rest of the book*, to primarily *descriptive* (descriptive-explanatory) accounts of law as a “social phenomenon”:

...one’s descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about those central cases. And then one’s account of the other instances can trace the *network of similarities and differences*, the analogies and disanalogies, for example, of form, function, or content, between them and the central cases. In this way, one uncovers the “principle or rationale” [Hart’s phrase] on which the general term (“constitution”, “friend”, “law”...) is extended from the central to the more or less borderline cases, from its focal to its secondary meanings.<sup>8</sup>

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<sup>7</sup> NLNR, 278-9 (emphases added).

<sup>8</sup> NLNR, 11 (emphasis added).

Here the idea of a “network of similarities and differences” was my tribute to *Philosophical Investigations* 66-67 on games,<sup>9</sup> though I put off actually citing those sections until the endnotes to chapter IV.<sup>10</sup> So I welcome Veronica Rodriguez-Blanco’s intent to relate Aristotle’s focal meaning to Wittgenstein’s insistence on complexity. We get beyond the denials of commonality which dominate Wittgenstein’s discussion in secs. 66-67 by following his pointer to purpose. And the burden of that first chapter was that the wholly legitimate purpose of pursuing a *general* descriptive-explanatory account of human affairs, such as Max Weber’s, can be effected well only by acknowledging that the concept-formation needed for such an account is dependent on standards of assessing *importance* which implicitly or, better, explicitly and self-critically track the standards of practical judgment we discern and employ in our truly practical deliberations towards choice and action in our own lives. On p. 18 of *NLNR* I say that a theory of natural law *might* be undertaken “primarily *for the purpose of* thus providing a justified conceptual framework for descriptive social science.” But I say also, in the next sentence, that that is not my book’s purpose or content, which is instead “primarily to assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens.”<sup>11</sup>

A few years after *NLNR* I revisited Weber’s sociology, pointing out on the first page of “On ‘Positivism’ and ‘Legal Rational Authority’” that Weber’s work is “among the most significant” of the “hidden streams nourishing jurisprudence in Oxford” since the mid-fifties. (Nicola Lacey’s biography of Hart makes the evidence, which I alluded to obliquely, fully explicit by reference to the annotations in Hart’s copy of Weber *On Law*.)<sup>12</sup> I then showed, by extensive quotation, how Weber’s account of the pure types of authority gave explanatory priority to “legal-rational” authority, defining the other pure types, charismatic and traditional, largely by a series of negations of the features of legal-rational rule. He justified this strategy tersely by saying that one should start from “what

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<sup>9</sup> Thus *Philosophical Investigations* 66: “for if you look at them [games] you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that.”

<sup>10</sup> *NLNR*, 98.

<sup>11</sup> *NLNR*, 18.

<sup>12</sup> Nicola Lacey, *A Life of H.L.A Hart: The Nightmare and the Noble Dream* (Oxford, 2004), 236-7.

is most rational and most familiar”. But I argued that the strategy could not have been reversed:

The proposed account is to be an account of *authority*, as distinct from other forms of motivation whereby one person “follows” the directives of another. We hope to differentiate authority from terrorism or highway robbery, and from co-ordinations of action by constellations of interest such as the relations between the monopolist and the others in his market. But if we treated, say, charismatic rule as primary, main elements of authority would not come into view (except as apparently arbitrary importations into the accounts of the secondary forms): for example, the elementary distinction between exercises of authority by the ruler and mere expressions of his personal wishes. Similarly, if we treated traditional rule as primary, we would have no account (save by subsequent importation) of that elementary feature of authoritative rule, *legislative enactment*, the introduction, on the ruler's authority, of a *new* “standing order” or general rule.<sup>13</sup>

I added the reflection, not as Weber's but as mine, that “A social order, actual or conceivable, resting on mistakes about human good is relatively opaque or unintelligible (because to some extent unintelligent).”<sup>14</sup> That did not repudiate or abandon the Platonic explanation for the primacy of the viewpoint of practical reasonableness, namely (to repeat) that there is asymmetry of viewpoints: the rational can understand the pre-rational (charismatic or traditional) *so far as* the latter is *intelligible*, but the pre-rational cannot understand the rational without being open to questions and questioning which expose the sub-rationality of the charismatic or traditional. Later in the same essay I commented a little on Weber's notable remark about the problem of legitimating authority: “It [natural law] is *the specific and only consistent type of legitimacy of a legal order* which can remain once religious revelation and the authoritarian sacredness of a tradition and its

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<sup>13</sup> Ibid., at 79.

<sup>14</sup> Id.



bearers have lost their force.”<sup>15</sup> Yet another reason to investigate the truth or otherwise of the claims of natural law theory or rational morality.

## II

Michael Perry says and repeats that “there is not just one morality in the world, there are many.”<sup>16</sup> He observes that “many moral philosophers write as if there were just one morality” and adds “or, at least, just one correct understanding of the term ‘morality’.” But the “many moral philosophers” he has in mind are interested in holding not so much that second position as the first, that there is, at least at the level of principles, “just one morality.” Nor do they hold this for the absurd reason Perry attributes to them when he says “they do this, no doubt, because many moral philosophers share an understanding of the term [‘morality’].”<sup>17</sup> No, they are clear, as Perry is not, that there is a distinction between moral beliefs, which are indeed many, and moral knowledge, that is, moral beliefs that are true. If and only if there are moral beliefs that are true is there *morality*, such as could concern a reasonable person when deliberating towards choice and action, or when engaging in philosophical reflection and a critical inquiry into the truth of *these* propositions about what should and should not be chosen and done. That is, these “many” moral philosophers have a secure grasp of the distinction that Austin and Mill draw between “positive” and “critical morality”: there are many positive moralities but there can, at the level of principle, be only one critical morality. They have a secure grasp of the difference between considering beliefs as propositional attitudes, real in the lives of those who have them, and beliefs as propositions awaiting my rational assent or withholding of assent. And of the distinction between an external point of view and an internal.

I could put this point another way (though I rather expect most people here already find it uncontroversial and some may find this other way unhelpful). In his penetrating account of conscience (an account initially controversial in his day), Aquinas argues that some people (call them BCs) should live the sort of life they should not live.

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<sup>15</sup> Weber *On Law* 227-8; Finnis, “On ‘Positivism’ ...” at 82.

<sup>16</sup> Perry p. 2 and *passim*.

<sup>17</sup> Perry p. 3 n. 5

For what one should do is, always, what one judges to be *true* about what one should do. And what BCs (mistakenly) judge is true about what they should do is that they should not live as (in truth) they should. That last sentence makes robust use of the transparency and substitutability that is the mark of thought from the internal, first-person perspective. Take it more slowly. BCs (mistakenly) judge that (say) it is true that they should not abstain from sacrificing some children to death in the mouth of Moloch. So (says Aquinas), since everyone's first loyalty should be to the truth, *they* (BCs) should not abstain from sacrificing children to Moloch, since their abstaining would be their defying [what they consider to be] the truth about what should be done.<sup>18</sup> And this is so, even though it is (unknown to BCs) true, of course, that no one should ever sacrifice any child to Moloch.

Aquinas is saying, in effect, that there are many moralities but it wouldn't be worth spending a moment trying to make reasonable judgments about what *should* be done unless there is (at the level of principles) only one morality, one coherent set of *true* moral beliefs, one set of rational principles about what human beings should not do.<sup>19</sup> (To talk about "our morality" without believing it to be *morality* is to have cut loose from, repudiated, our morality, even if one goes on hanging around in its shadow.) One way amongst other reasonable alternative ways of talking about the true moral principles is to call them natural law.<sup>20</sup> But the name is very optional.

Michael Perry has put his paper under the auspices of Nietzsche's thought that God is dead, and also of Philippa Foot's thought that moral philosophers have failed to respond to Nietzsche's challenge. Matthew Kramer has suggested that my work overlooks Nietzsche. But my lectures in the early 1970s touched on Nietzsche, and though his name may be absent from it, *NLNR* is conceived in part as a response to him; the parts of Nietzsche on which my lectures had focused I address in a recent paper on

<sup>18</sup> Aquinas's examples are: committing adultery, committing incest, denying that Christ is God, and engaging in promiscuous sex. But he makes clear that the real moral obligatoriness of an erroneous conscience holds however atrocious the wrong that the person in error judges to be right. *De Veritate* q. 17 a. 4; *Summa Theologiae* I-II q. 19 a. 5.

<sup>19</sup> "There is much to be said for Leo Strauss's judgment that 'knowledge of the indefinitely large variety of notions of right and wrong' – i.e. of Perry's "many moralities" – "is so far from being incompatible with the idea of natural right that it is the essential conditions for the emergence of that idea: realization of the variety of notions of right is *the* incentive for the quest for natural right." *NLNR*, 29, quoting Strauss, *Natural Right & History* (Chicago, 1953), 10.

<sup>20</sup> See e.g. *NLNR*, 103.

punishment.<sup>21</sup> There I track Nietzsche's theory of conscience, the heart of his *Genealogy of Morals*, into its "self-stultifying conclusion or impasse," murkiness cultivated in "the stale air of Nietzsche's writing room" and far different from the clean coherence and insight of Aquinas's treatment of false conscience. Quoting and paraphrasing Nietzsche:

The will to be truthful, to seek and hold the truth, is itself a product of that sickness, conscience. The truth that conscience is a sickness and that God, the only ground of truth's value, is nonexistent therefore puts in question, renders problematic, the will to truth, the value of truth and of being truthful: "the value of truth must for once, by way of experiment, be *called into question*..."<sup>22</sup> Nietzsche's phrase "by way of experiment" reveals the ultimately frivolous, dilettantish character of his thought, or the depth of the impasse to which his arbitrary assertions and denials have driven him. But he does not deny, indeed he here, at this juncture, admits that the "core" of conscience is, in fact, the will to truth, to truthfulness.<sup>23</sup>

Once one has discerned the strictly self-refutatory character of Nietzsche's thought, there is little reason for one's moral-philosophical reflections to be concerned further with its detail, which belongs instead to the part of intellectual history which concentrates on spiritual pathologies, the origins of Nazism, and so forth.

The main part of *NLNR* begins with a chapter on the will to truth, the intelligible good of knowledge and that responsiveness to intelligible goods (including truth and knowledge of it) which we call "will".<sup>24</sup> The next chapter but one is devoted to

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<sup>21</sup> Finnis, "Retribution: Punishment's Formative Aim," *Am. J. Juris.* 44 (1999) 94-102 at 91-6.  
<sup>22</sup> *On the Genealogy of Morals* ([1887] trans. Douglas Smith, Oxford, Oxford University Press, 1996), III. 24 (p. 128). Also p. 126: "these hard, severe, abstemious, heroic spirits... these pale atheists, anti-Christians, immoralists, nihilists ... these men in whom the intellectual conscience is alone embodied and dwells today... These men are far from *free* spirits: *for they still believe in the truth!*..." And here Nietzsche associates himself with the *secretum* of the highest grades of "that invincible order of the Assassins, that order of free spirits *par excellence*." The *secretum* that "nothing is true, everything is permitted." He calls this a "proposition" (true? false?) with "labyrinthine *consequences*" (ibid.), and it seems to be this that he has in mind when he says, III.27 (p. 135): "from now on morality will be *destroyed* through the coming to consciousness of the will to truth." Writing this in 1999, I failed to notice, incidentally, that here Nietzsche foreshadows the diseased attraction of growing numbers of today's atheists and ex-Christians (usually, today, on the political "left") to certain kinds of Islamic suicidal terrorism of which the Assassin *fedayeen* are one proto-type..

<sup>23</sup> Finnis, "Retribution..." at 94.

<sup>24</sup> *Will* is not studied explicitly in *NLNR* until ch. XI.8, where pp. 337-41 are important for an understanding of the whole book. But it follows from what is said there that will had been under

considering the implications – which turn out to be *morality* -- of another intelligible good, reasonableness “for its own sake” in deliberating and choosing, as it bears on one’s will to participate in all the basic intelligible goods. If one reads these chapters in the spirit of an intellectual historian, a *genealogist* of concepts, one is very likely to miss their point, or rather their argument. For their dialectic is largely an attempt to interest the reader in the *question* what is worthwhile, and in the range of *opportunities* that become intelligible as goods only in one’s awareness of the possibilities open to one. They are an attempt to bring before conscious and critical reflection those original moments of non-inferential insight when one first understood, as all healthy children do in what is called the dawn of reason, (i) that knowledge (for example) is not merely a possibility but also an opportunity, a possible way of being *better-off*, and (ii) that the self-preference of (for example) the bully in the school playground or the street is offensive to *reason* (even when one is surrendering to the temptation to join him on the winning side).

When Michael Perry, echoing Jeffrey Goldsworthy and others, complains that I spend few sentences confronting egoism and self-preference, the suspicion arises that chapter III on the intelligible good of knowledge as a paradigm of intelligible goods has been passed over. He says that “the totality” of NLNR’s “brief answer” to the “ground-of-normativity question” is the following sentence from chapter IV:

“[My own well-being] is [not] of more value than the well-being of others, simply because it is mine: intelligence and reasonableness can find no basis in the fact that A is A and not B (that I am I and not you) for evaluating (our) well-being differentially.”

Of course, the sentence as it stands sounds over-simple; two sentences earlier I point forward to chapter VI’s discussion of the friendship which entails both differential preferences amongst people and the intelligent rejection of egoism; the discussion of reasonable self-preference on the next page of chapter IV points forward to chapter VII’s

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consideration from the outset of ch. III. “Responsiveness” is the term I use to define will in *Aquinas*, but already in *NLNR*, p. 339, I say that Aquinas regards [intelligent] human movement “as a person’s response to the attraction of (something considered to be) good”. (But “attraction” is a hazardous model for the operations of reason and will, since it obscures the role of reasons, which motivate in a *sui generis* way not well modeled by sub-rational motivations such as sensory or emotional attraction and aversion.)

showing how the thought that “each person counts for one and only one” “is not reasonable as a principle for the practical deliberations of anyone.”<sup>25</sup> But the sentence quoted, which leads straight into the approving mentions of universalizability and the Golden Rule as standards of moral reasonableness, is in no way the totality of the dialectical argument for the position it affirms. It harks back to core positions of chapter III, of which I will quote just one, taken (as it happens) from the dialectic with John Mackie’s updated Humeian scepticism (the “argument from queerness” of value predicates). “It is obvious,” I said,

...that [someone] who is well informed, etc., simply *is* better-off (other things being equal) than [someone] who is muddled, deluded, and ignorant, that the state of the one is better than the state of the other, not just in this case or that, but in all cases, as such, universally, and *whether I like it or not*. Knowledge is better than ignorance. Am I not compelled to admit it, willy nilly? It matters not that I may be feeling incurious myself. For the understanding affirmation of the practical principle is neither a reference to nor an expression of any desire or inclination or urge of mine. Nor is it merely a reference to (or implied presupposition of) any desires that my fellows happen to have. It goes beyond the desires and inclinations which may first have aroused my interest in the possibility of knowledge and which may remain a necessary substratum of any interest in truth sufficient to *move* me to pursue it *for myself*. It is a rational judgment about a general form of human well-being, about the fulfillment of a human potentiality. As such, it has (in its own way) the peremptoriness of all other rational judgments. It constitutes a critique of my passing likes and dislikes. The practical principle is hard to play fast and loose with; I may ignore it or reject it, but again and again it will come to mind, and be implicit in my deliberations and my discourse, catching me out in inconsistency. To avoid it, I have to be arbitrary.<sup>26</sup>

Against this background understanding of what is meant by affirming a basic intelligible good (“value”) such as knowledge of truth, or life, or friendship, or practical

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<sup>25</sup> NLNR, 177.

<sup>26</sup> NLNR, 72.

reasonableness, Perry's objection to universalizability, and his claim that egoism's challenge to moral normativity has gone unanswered, miss the point. Here is his objection, picking up on my statement that my own well-being is not of more *value* than the well-being of others:

My own well-being is not of more value *to whom* than the well-being of others?  
My own well-being – or the well-being of someone I love, like my child – may well be of more value *to me* than your well-being; or, your well-being may be of no value to me; in some situations, your well-being – your continued existence – may be a disvalue to me...

and so forth, concluding with Richard Joyce (the new Mackiean) that even if A1's valuing his own humanity requires him, in reason, to accept "that others value their humanity" as he does [his], "this falls dramatically short of his being rationally required to value their humanity."<sup>27</sup> This is, I fear, confused. My valuing my own humanity does *not* rationally require me to accept that others *do* value their humanity; maybe they do, maybe they don't. But it does rationally require me to judge their *humanity* as valuable as mine, a valuation which is fully compatible with my judging B's appearance, C's abilities, D's character, and other particular aspects of particular human persons' particular attributes to be inferior to E's, F's or mine. It is not clear to me whether Perry and Joyce realize that they are bluntly denying that *equality of persons* which is the indispensable foundation of human rights and justice. It is quite clear to me that they have not engaged with, let alone produced an argument against, the understanding of *value*, that is, *intrinsic value*, which I expound in chapter III as necessary to understanding *reasons* for action.

Perry says: "that Y is a reason for A – a *practical* reason, a reason for choosing to do *this* rather than *that* – does not entail that Y is also reason for B."<sup>28</sup> But if Y is a *reason* for choosing this *kind* of thing, it is a reason for *anyone* contemplating this *kind* of thing, though of course countless circumstances may render everything of that kind unavailable or unsuitable or less appropriate for many, or for everyone, or for everyone other than A, if and when A's circumstances are different from everyone else's in a way that bears on the applicability of the reason (Y). Perry speaks in the preceding sentence

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<sup>27</sup> Perry p. 42, quoting, in the last sentence, Richard Joyce, *The Myth of Morality* (Cambridge U.P. 2002), 126.

<sup>28</sup> Perry p. 42 n. 83.

of X being “of value, whether instrumental or intrinsic, to A” and says that this does not entail that X is also of value to B (or, I suppose anyone else). But what then could be intrinsic about the value? I suspect that Perry means by “intrinsic” no more than non-instrumental, and thinks of A’s *desire* for X being the very ground of X’s value, which after all, as Perry insists, is no more than “value-to-A”. But any such thought overlooks both Hume’s correct acknowledgement that desire as such is no reason, and the demonstration by Christine Korsgaard and others that Humean “instrumental reasons” – valued as effective means to satisfy desires -- are in truth themselves no reasons at all unless the ends to which they are means are not merely desired but desired for some intelligent reason. As I put the argument in “Foundations of Practical Reason Revisited” (2005):

There can be no practical rationality at all – no even hypothetical imperatives, no rationally required means -- unless there are “some rational principles determining which ends are worthy of preference or pursuit”,<sup>29</sup> “normative principles directing the adoption of ends”,<sup>30</sup> “something which gives normative status to our ends”<sup>31</sup> by giving “unconditional reasons for having certain ends, and, it seems, unconditional principles from which those reasons are derived.”<sup>32</sup> ... For “unless something attaches normativity to our ends, there can be no requirement to take the means to them.”<sup>33</sup> Such ends, moreover, have to be “*good*, in some sense that goes beyond the locally desirable.”<sup>34</sup> For “I must have something to *say to myself* about why I am [willing an end, and am committed and remain committed to it, even in the face of desires that would distract and weaknesses that would dissuade me] -- something better [to say to myself], moreover, than the fact that this is

<sup>29</sup> Korsgaard, “Normativity”, p. 230

<sup>30</sup> Ibid, p. 233

<sup>31</sup> Ibid, p. 250.

<sup>32</sup> Ibid, p. 252.

<sup>33</sup> Ibid., p. 251

<sup>34</sup> Ibid, pp. 250-251. Korsgaard, at 251, 252, is tempted to resile from this to allow for a “heroic existentialist act” of “just tak[ing] one’s will at a certain moment to be normative, and commit[ting] oneself forever to the end selected at that moment”, “for no other reason that that [one] wills it so”. But she should concede that unless such a person considers that there is something worthwhile in doing so, some good in or reason for doing so, such an “act of commitment” and of subsequent “taking as normative” is not rational but irrational.

what I wanted yesterday”<sup>35</sup> (or indeed wanted a moment ago or even, in the struggle of feelings, [am dominantly desirous of] right now).

We might summarize Korsgaard’s observations by saying: basic reasons for willing – for choosing and carrying out one’s choice – state *what is good about* what the action intends, and good in a way that could be said to give unconditional reason for acting in pursuit of such good(s) or at least with an eye to avoiding what would negate such good(s). Such good-identifying reasons are unconditional, I take her to mean, not in the sense that they are “categorical” or “moral” but in the sense that they are non-dependent, not in need of justificatory or validating explanation – primary, intrinsic, basic.<sup>36</sup>

Of such reasons, there is no reason for me or anyone to think that they identify what is good for John Finnis but not also for you and our children and anyone’s children. What, for instance, is the sense of Perry inviting anyone to consider his arguments unless knowledge of the truth of their conclusions is, as such, good for others as it is for Perry? The child – each of us -- who comes to understand that knowledge is a good understands that it is good for anyone in the classroom, or any classroom, or outside any class, and that it does not come with “for me but not others” as part of its intelligibility, indeed that it comes with no proper name (and no surrogate for a proper name, such as “me”) in that intelligibility, but rather with the sense that it is good for anyone, even those who do not yet understand it, or have no interest in it.

Perhaps near the root – at least the argumentative root -- of Perry’s mistake here is his assimilation of such basic reasons for action with the highly relativized-to-circumstances reasons which provide the “reason for choosing to do *this* rather than *that*”.<sup>37</sup> But the basic reasons direct us to intrinsic goods that have the character I put at the head of *NLNR*’s attempt to recapture the primordia of thinking about what to be interested in, and to recapture them by re-enacting intelligent interest in the good of knowledge:

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<sup>35</sup> Ibid., p. 250

<sup>36</sup> Finnis, “Foundations of Practical Reason Revisited” *Am J. Juris.* 50 (2005) 109 at 113-4. On pp. 114-7 I go on to show how Korsgaard’s adherence to Kant sadly blocks her understanding of the way such first practical principles bear on moral deliberation and reflection.

<sup>37</sup> Perry p. 41 n. 83.



So readily that one notices the transition only by an effort of reflection, it becomes clear that [say] knowledge is a good thing to have (and not merely for its utility), without restriction to the subject-matters that up to now have aroused one's curiosity. In explaining to oneself *and others*, what one is up to, one finds oneself able and ready to refer to *finding out, knowledge, truth* as sufficient explanations of the point of one's activity, project or commitment. One finds oneself reflecting that ignorance and muddle are to be avoided, simply as such and not merely in relation to a closed list of questions that one has raised. One begins to consider the well-informed and clear-headed person as, to that extent, well-off (and not only for the profitable use he can make of his knowledge). "It's good to find out..." now seems to be applicable not merely in relation to oneself and the question that currently holds one's attention, but at large – in relation [not to choosing just *this* in preference to *that* but] to an inexhaustible range of questions and subject-matters, *and for anyone*.

To mark this distinction between "good", referring to some particular objective or goal that one is considering as desirable, and "good", referring to a general form of good that can be participated in or realized in indefinitely many ways on indefinitely many occasions, it will be useful to reserve the word "value" so that (for the purposes of this book) it signifies only the latter sense of "good".<sup>38</sup> Since then I've lost my taste for the word "value", and prefer to speak of "intelligible good" and "[intrinsic] reason for action". But the theses of the passage remain, I suggest, intact, and sufficient to correct Perry's and Joyce's solipsistic and, in entailment, nihilistic reduction of "intrinsic value" to "value for me".

### III

The reference in that last-quoted passage from *NLNR* to "general form[s] of good that can be participated in ...in indefinitely many ways on indefinitely many occasions" provides a suitable occasion for taking up some principal points in Steven Smith's reflections. He sums up the focus of his paper as bringing to light difficulties in "the picture of 'persons pursuing good'". There is a nest of difficulties – with friendship, with

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<sup>38</sup> *NLNR*, 61.

obligations to others, and with authority -- and I shall say something about these in due course, but let's start with what Smith treats as the underlying "framework" of which these difficulties are the "manifestations":<sup>39</sup> the image of someone "pursuing goods", an image which Smith associates with "modern individualism"<sup>40</sup> and with "images of investors pursuing gains in the market", a picture that "makes the subjectivist orientation in ethics seems natural, plausible – even irresistible."<sup>41</sup>

I have sympathy with this anxiety. It is expressed at several points in *NLNR*. Two pages after the passage I last quoted, I said:

...such ...principles can be disengaged and identified, by reflection not only on our own thinking but also on the words and deeds of others. In trying to make sense of someone's commitments, projects, and actions over a period, we may say that he acted "on the basis that" knowledge is a good worthy of a life-shaping devotion. The good of knowledge was not for him an "end" [scare quotes] external to the "means" by which he "pursued" [scare quotes] it or sought to "attain it". Rather, it was a good in which, we may say, he *participated*, through or in those of his commitments, projects, and actions which are explicable by reference to that basic practical principle, that basic form of good.

And then on the page summarizing the whole two chapters' discussion of basic goods, I said:

... one's self-determination and self-realization is never consummated, never successfully or finally completed. And none of the basic aspects of of one's well-being is ever fully realized or finally completed. Nor does a basic value lie at the end of one's choice, activity, and life in the way that the culmination of a physical performance and the goal of a definite course of action typically lie at the end of the performance or course of action. So "pursuit" and "realization" are rather misleading in their connotations here, and it is convenient to say that one *participates* in the basic values... By participating in them in the way one

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<sup>39</sup> Smith [p. 46 after cue 87]

<sup>40</sup> Smith [p. 6 (after cue 10)]

<sup>41</sup> Smith [p. 45 after cue 84]

chooses to, one hopes... for... a certain development as a person, a meaningfulness of one's existence.<sup>42</sup>

Smith observes that there is in *NLNR* no explicit, formal treatment of persons. The book's index lists "personality" but not "person". The discussion of persons is to be found largely under the index entry "Self-constitution (self-determination, self-perfection)", an entry which does less than nothing to allay Smith's anxieties about individualism.

So in recent years, I have done a little to make explicit and more adequate the implicit and under-developed understanding of persons that should and does underpin an account of natural law such as *NLNR* attempts to give. Taking off from the last sections of chapter V of *Aquinas*, I try in two articles in 2005 to articulate both the union of materiality with immateriality that is "the metaphysical foundation of human equality,"<sup>43</sup> and the relation between the inter-personal love-of-friendship and the basic reasons for action. Studying the representation of inter-personal union in love by Shakespeare in the amazing poem usually called "Phoenix and Turtle", I suggest that

love of persons, each precisely for his or her own sake, has the reasons which the first practical principles pick out, the human goods towards which those principles direct us, each of these goods an aspect of the worth (in deprivation or fulfillment) of each human being.

Practical reason's first principles are, so to speak, transparent for the persons who can flourish in the kinds of way to which those principles direct us – so transparent that it is, in truth, those persons for whose sake we are responding

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<sup>42</sup> *NLNR*, 96; see also 64, 104, 262

<sup>43</sup> "which entails the inequality with us of all other creatures of which we have experience, all of them in truth not merely non- but sub-human, or lacking in the dignity of the human because lacking a radical capacity foundational to our reality": "Foundations of Practical Reason Revisited" at 126. This radical capacity is exemplified by our being the kind of being that can do immaterial things (meaning, proving, invalidating, promising, betraying...) with material things (words, gestures...). On radical capacity, see Finnis "A Philosophical Case against Euthanasia", etc., in *Euthanasia: Ethical, Legal and Clinical Perspectives*, ed. John Keown (Cambridge, Cambridge U.P., 1995), 23-35, 46-55, 62-71, especially 30-31, 68-70. The metaphysical foundation, soul as the very form and act(uality) of our body, is explored a bit more in "The Thing I am": Personal Identity in Aquinas and Shakespeare," *Social Philosophy and Policy* 22 (2005) 250-282, also in *Personal Identity*, ed. Ellen Frankel Paul, Fred D. Miller and Jeffrey Paul (Cambridge and New York, Cambridge U.P., 2005), 250-282 at 253-257.

when we respond at all to those reasons' summons. Such love goes all the way from the truly all-embracing "Love your neighbor as yourself" to particular commitment to another<sup>44</sup> – for example, the uniquely exclusive while outward-looking commitment constitutive of marital love – and is of the essence of all the practical normativity we call moral and, in proper case, legal. And for backsliders like us, the relatively few persons of heroic virtue can be a reminder, inspiring rather than depressing, that *but for* one's own – one's "love's" and "will's" -- responsiveness to what these reasons summon us to, rational capacity would and will be for each of us nothing more than what Hume pretended it cannot but be for all, a slave of the passions that thus is, gives, and has "reason none".<sup>45</sup>

Shakespeare's poem celebrates the love of two persons (presented for form's sake as birds); they are spouses whose love, transcending their *eros* for each other and constituting them an astounding unity or union, is one of mutual fidelity, devotion and faithfulness to their shared faith, under conditions of enforced separation, expropriation, and death. Such a love certainly seems to challenge the image of "persons pursuing goods". I went on to say:

(i)... the Love exemplified in the literally exemplary couple has the true reasons .. that are given by the worth of the persons involved, their true loveableness, but  
 (ii) ... to live up to this takes more than the intelligibility of the loveable goods instantiated in these loveable persons; it takes the wholehearted response of those persons; and (iii)... to observe by example the possibility of such devoted, constant, "true" responsiveness enables one to deepen and reinforce one's understanding of the goods of knowledge, friendship, and practical reasonableness and thus also one's understanding of the good/value of the persons whose whole lives instantiate and exemplify those goods so awesomely. Love

<sup>44</sup> [See *Aquinas*, 127: "'One should love one's neighbor.' But to love a person volitionally (not simply emotionally) is to will that person's good. So, to love one's neighbor is to will the neighbor's good – and not just this or that good, but good somehow integrally; and nothing inconsistent with a harmonious whole which includes one's own good (likewise integrated in itself and with others' good). Thus the love of neighbor principle tends to unify one's goals. Moreover, the love of neighbor required by this principle need not be a 'particular friendship'. (FN: The love involved in a particular friendship {amor amicitiae} does have at its core, however, one's willingness as a friend to treat the friend as one treats oneself {amans se habet ad amatum, in amore amicitiae, ut ad seipsum} : II-II q. 28 a. 1 ad 2.)"]

<sup>45</sup> "Foundations..." , 128-9.

*does have* reasons, but these would remain “no reason” if they remained merely intelligibilities affirmable by reason, and were not taken up, out of the fungibility of goods that can be and are instantiable in countless people, and embodied in *commitment to this particular person*. (Something like the same issue arises in patriotism and other forms of loyalty.)

This makes, I think, some progress on *NLNR*, and goes a long way to meeting the first of Steven Smith’s three particular difficulties, “Which comes first, the persons or the goods?” An adequate understanding of what is lovable in persons begins with one’s initial and ever-developing insight into the basic forms of good in which persons can participate and flourish, but what makes these forms of good capable of being instantiated and participated in is the givenness and nature of persons. The epistemological sequence – from understanding of objects (goods) to understanding of acts and thus to understanding of capacities and thus to understanding of beings of this nature – is the opposite from the ontological sequence (nature grounds capacities, capacities acts, and acts the attainment of their objects). And the goods are known in their fruition only in the concrete living existence of the particular persons for whose sake particular persons made choices, entered and adhered to commitments, and acted for the reasons which direct us to those kinds of good. It is not until after *NLNR*, in *Fundamentals of Ethics* (1983), that I touch on the significance of the epistemological sequence, and articulate the way in which it is reversed in the ontological domain.<sup>46</sup>

Smith’s second difficulty is “the paradox of friendship”. How, Smith asks, can I “care about others for purely other-regarding reasons”, without the other-regarding reasons that I have being “incorporated into and operative by means of self-regarding reasons”? How can I “transcend my own motives and thus...care about you for your own sake”? Aren’t I always acting “ultimately for my own happiness (which I have now associated with *your* happiness)”? And if, on the other hand, “I rationally apprehend that friendship...is a good *without regard to myself*, then it seems I will be acting in the more detached and duty-oriented way that, though perhaps admirable, is arguably not what friendship consists of”. I believe the sketch of the “dialectic of friendship in *NLNR* pp. 142-3 contains what is needed for a response, but *Fundamentals of Ethics* is more

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<sup>46</sup> *Fundamentals of Ethics* (Oxford & Georgetown UP, 1983), 21.

explicitly responsive. In the paradigm or central case of friendship between two human beings:

...A is the friend of B when (i) A acts (or is willing to act) for B's well-being, for the sake of B, while (ii) B acts (or is willing to act) for the sake of A's well-being, for the sake of A, ... (iii) each of them knows of the other's activity and willingness, and of the other's knowledge, and (iv) each of them coordinates (at least some of) his or her activity with the activity (including acts of friendship) of the other – so that there is a sharing, community, mutuality and reciprocity not only of knowledge but also of activity (and thus, normally, of enjoyment and satisfaction). Now, when we say that A and B act “for the sake of” each other, we mean that the concern of each for the other is founded, not in devotion to some principle according to which the other, as a member of a class picked out by that principle, is entitled to concern, but rather in regard or affection for that individual person as such.<sup>47</sup>

That is, friends paradigmatically will not be acting in a “detached and duty-oriented way” towards each other. As to the anxieties about self-love, especially the anxiety which I said “most insidiously undermines any and every ethics, the anxiety that concern to be practically reasonable...is ultimately no more than a refined form of self-cultivation”, I responded:

That anxiety [can] be allayed, because every form of genuine friendship relativizes our self-love without destroying or discrediting it. Friendship between A and B is a good for A (an aspect of his flourishing) and a good for B, too. But, to be a friend, A must act substantially for B's good (not for his own, A's) and must value B's good for the sake of B (rather than for the sake of what he, A, can get out of the friendship); in other words, A must treat B's own good as an aspect of his (A's) own good. Yet, at the same time, B must value A's good for the sake of his (A's) good for the sake of A, and treat A's good as an aspect of his (B's) own good. It follows that A, for the sake of B, must value his (A's) own good. In the eyes of his friend A, B's good is transparent for A's good, which in turn is transparent for B's... And thus (to shift the metaphor) the reciprocity of concern,

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<sup>47</sup> *Fundamentals of Ethics*, 147-8.

friendship, love...does not come to rest at either pole. Self-love is not destroyed, but is taken up into a new perspective in which one is no longer acting exclusively for one's own sake (or from one's own point of view) nor exclusively for one's friend's sake (or from his or her point of view); rather, *one is acting for a good that is truly common*.<sup>48</sup>

In this ascent to the perspective of a good that is truly common to the friends one finds the key to the paradox of friendship, rendering the paradox not so much dissolved as, instead, benign, acceptable, another remarkable element in the complex, *sui generis* reality of human existence and value. I do not see that Smith's account of his difficulty with the paradox mentions or refers to the possibility, still less the actuality, of this ascent, where individualism is truly overcome -- to the extent that it reasonably can be. (For of course there is much truth in individualism and concern for autonomy, which is in no way peculiarly modern. "What shall it profit a man", says the Christian gospel, "if he gain the whole world and lose his very self [*heauton*]?"<sup>49</sup> And Aquinas's opening statement about the ethics of his *Summa Theologiae* is that they consider people precisely as *principium*, source, of their own deeds, having free choice [another truly remarkable reality, falsifying the Leibnizian and common-sense principle that everything has a sufficient reason] and power over those deeds, deeds which are really human only if one is fully in charge—ruler, master, owner (*dominus*) of each of one's own freely chosen actions.)

The third of Smith's difficulties takes off from the same locus as Perry, but poses the problem Why be impartial? in a different way. He complains that I offer a "Kantian-type argument" from, or to (I'm not sure which he thinks it is) universalizability, and says:

presumably an argument for impartiality is offered on the (very plausible) assumption that there is a legitimate question to be addressed. *Why* should we care about the good of others?<sup>50</sup>

<sup>48</sup> *Fundamental of Ethics*, 148-9.

<sup>49</sup> *Luke* 9.25; *Matt.* 16.26 & *Mark* 8.36 say "lose his own soul/life [*psyches autou*]"

<sup>50</sup> Smith [p. 12after cue 21]

And this question “Why should I care about others?” is repeated many times, sometimes in tandem with “Why should I be moral?”. But the assumption that there is here a legitimate question, and one that should be addressed by an “argument”, perhaps a kind of proof, is an assumption to be critically examined. As I say at the outset of my *Aquinas* section on “egoism, self-fulfilment, and common good”:

Many today<sup>51</sup> think that the fundamental problem of ethical and political theory is to escape egoism—to show how and in what sense one can be required, in reason, to give weight to others’ interests against one’s own, and to recognise at least some moral duties to other people. Theories are constructed to expound the rationality and/or natural primacy of egoistic ‘prudence’, and to explore the question how we may ‘bridge the gap’ between such prudence (on the near bank) and morality (on the farther shore). In Aquinas’s view, such thoughts and theories are radically misconceived.

For: the only reasons we have for choice and action are the basic reasons, the goods and ends to which the first practical principles direct us. Those goods are human goods; the principles contain no proper names, no restrictions such as ‘...for me’.<sup>52</sup> So it is not merely a fact about the human animal, but also and more importantly a testimony to people’s practical understanding, that they can be interested in the well-being of a stranger, whom they will never meet again but now see taking the wrong turning and heading over a cliff; for it is the same good(s) that the stranger can share in or lose and that I can: specifically human good(s).<sup>53</sup>

Moreover, every such response, in which one is moved by the intelligible

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<sup>51</sup> Henry Sidgwick, *Outlines of the History of Ethics for English Readers* ([1886] 1902), 198: “in the modern ethical view, when it has worked itself clear [of Greek moral philosophy], there are found to be two [regulative and governing faculties recognised under the name of Reason],--Universal Reason and Egoistic Reason, or Conscience and Self-Love.”

<sup>52</sup> See II Sent. d. 3 q. 4 a. 1 ad 2: my will’s intrinsic object is good, not mine. And the good is the good of all who share the same nature: see II-II q. 31 a. 2 ad 2; q. 64 a. 6c.

<sup>53</sup> See ScG III c. 117 n. 5 [2899]; Eth. VIII. 1 n. 4 [1541]; Car. q. un. a. 8c & ad 7; Div. Nom. c. 4. 9; Perf. c. 14 [637]: ‘because all human beings share in the nature of the species {convenient in natura speciei}, every human being is naturally a friend {amicus} to every human being; and this is openly shown in the fact that one human being guides, and aids, in misfortune, another who is taking the wrong road.’ (This is not contradicted by the next sentence, affirming that ‘one naturally loves oneself more than another person’.) Eth. IX. 5 n. 2 [1821] says that goodwill towards strangers is not friendship, meaning not ‘friendship’ in the focal sense.



good one can instantiate or protect in the existence of another person, also creates or reaffirms a relationship between us, additional to the relationship which consists simply in our both being human. This willed relationship Aquinas calls societas, and it is itself a basic human good: harmony<sup>54</sup> among human persons—friendship, whether in its central or in one of its secondary forms, neighborliness, fraternity.<sup>55</sup>

One can choose to be an egoist. But one has no choice whether harmony among persons, or friendship, is a basic good, intrinsic to human flourishing; nor about whether harmony is blocked, and friendship negated, by egoism. The choice to be a thoroughgoing egoist sets itself against reason; for it treats the basic reasons for action as if they directed me, not towards a universal human good which includes my own good as one amongst other instantiations, but rather just towards my good—as if the principle came specified with a proper name (mine!). And my choice to be an egoist also sets me against a basic reason for action, the reason directing me to a good in which I could otherwise have participated: friendship and harmony amongst persons. For there can be no friendship or real harmony between persons where one fails to recognize, or to take as a reason for action, the good of the other person(s) as worth pursuing and respecting as an end in itself, for the sake of the other(s) rather than merely for one's own sake.<sup>56</sup>

So egoism, misconstruing all the basic goods, and contemning the basic good of societas, radically severs one from the good of practical reasonableness itself.<sup>57</sup>

<sup>54</sup> 'Harmony {harmonia} is the fittingness of order {convenientia ordinis}' (Div. Nom. c. 5. 1 [650]); and 'Good consists in order; but people are rightly ordered to other people in mutual dealings {in communi conversatione} both in words and in actions, so that each relates to each as is proper; [and] this fittingness of [interpersonal] order {convenientia ordinis} [is a special type of intelligible good {specialis ratio boni}]' (II-II q. 114 a. 1c); 'in intelligent/intelligible {intellectualibus} [i.e. human] loves there is not only order but also the fittingness of order' (Div. Nom. c. 4. 12 [457]).

<sup>55</sup> 'Neighbor', 'brother {frater}', and 'friend', in this context, all denote the same affinitas and the same rational motive: II-II q. 44 a. 7c.

<sup>56</sup> See e.g. II-II q. 44 a.7c.

<sup>57</sup> *Aquinas*, 111-112. Perry claims that in *NLNR* the only argument for impartiality is from universalizability, and that in the recent paper "On 'Public Reason'" (in which a short version of the just-quoted passage is given) the only argument is from friendship. In fact, in both (and I think all) my treatments of this issue, both the argument from the universal character of intelligible human goods and the argument from the good of friendship are deployed, though in *NLNR* they

About such first principles of practical reason, as in any field of knowledge, there can be no proofs by argument *to* the principles; there can only be dialectic, which shows the error or impotence of objections. So take Smith's mantra, "Why *should* I care about others?" It quite lacks the force he thinks it has, for in using the term *should* it trades with currency that its own success as an argument against the rational force of friendship and impartiality would reveal to be mere counterfeit. As the argument of Korsgaard and others against Humeian "instrumental reasons" only emphasizes, there is no *should* to be had save in reasons, nothing normative to *say* to correct the *current* dominant desire of one's fat relentless ego/id, or to condemn one's timid aversion to scratching one's finger to save oneself (not to mention the whole world).<sup>58</sup> There is intelligibility in kinds, not in particulars as particulars, nor in my particularity. So there is no *should* available even to egoistic deliberation, unless there are intelligible goods such as life, knowledge, friendship and practical reasonableness which are good for any of us and, in principle, *as* good for any one of us as for the others of us. And this is only one move in the kind of dialectic that Socrates/Plato practiced against Callicles, forefather of Hume and Nietzsche, exposing the self-refutation of every *discursive* defense of egoism. For in the inter-personal engagement of conversation seeking enlightenment, it is self-evident that egoism has no place and *should* be left behind as the sub-rational, self-mutilating, all too human but inhuman desire it is.<sup>59</sup>

#### IV

Leslie Green's reflections on the duty of governance and on my account of authority are penetrating and generous. I have little to subtract from them; what I would add are some nuances that I would equally wish to have found, or found more explicitly, in *NLNR*. While adding these touches, I can also address Steven Smith's more elemental

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are deployed apart rather than together. Perry has cropped the respective paragraphs quoted from *NLNR* and from "On 'Public Reason'," eliminating from each the references to the respective "other" argument.

<sup>58</sup> David Hume, *A Treatise of Human Nature*, ed. L.A. Selby-Bigge, rev. P.H. Nidditch (OUP, 1978), 416: "'Tis not contrary to reason for me to prefer the destruction of the whole world to the scratching of my finger..."; see Finnis, "Foundations of Practical Reason Revisited", at 112.

<sup>59</sup> Finnis, "Natural Law & the Ethics of Discourse," *Am. J. Juris.* 43 (1998) 53-73; for its original context of debate with Habermas, see it in *Ratio Juris* 12 (1999) 354-373.

difficulties with the idea of authority, difficulties that lead him to embrace one of the less plausible, I think, of Hannah Arendt's oracular pronouncements, that authority has so far vanished from "the modern world" that neither practically nor even theoretically are "we" in a position to know what authority is.<sup>60</sup>

It is perhaps worth noting that my emphasis on governance as in a sense prior to being governed, on authority to govern as in a sense prior to obligation to obey, emerges in *NLNR* as early as chapter I. For in expounding the significance of the internal point of view I shift from Hart's paradigm, which is the viewpoint of those who *accept* the rules and *use* them as guides to their own, like others', conduct. My paradigm, throughout chapter I, is the viewpoint of those who *make* the rules and *maintain* them. So my argument that any explanatory *general* account of law (as a kind of institution and social reality of thought and action) needs to select its descriptive-explanatory concepts from among those used in sound conscientious deliberations (say, the theorists' in his or her real life) is an argument that pivots on the following thought. The internal viewpoint has a central case which is not the viewpoint of careerists, or conformists, or traditionalists. And I offered a reason widely overlooked -- for that thought, and for my assertion that the central case of the internal viewpoint is the judgments and dispositions of those who treat the law of their community as *morally* significant. The reasoning is this:

If there is a point of view in which...the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a view point will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description.<sup>61</sup>

And I might well have mentioned that in this viewpoint it is important that law should be restored or replaced when it has broken down.

Both Green and Smith helpfully take us back to the time of troubles where authority emerges by virtue, as I argue, of the prospective benefits attainable only by prospective efficacious direction which, by its salience, can coordinate social conduct

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<sup>60</sup> Smith [p. 30 cue 58]

<sup>61</sup> *NLNR*, 14-15. The passage admittedly first mentions obligation.

(forbearances as well as acts). Smith and Green take first a time of trouble on the highway; a tree has fallen or an accident has happened and, if there are not to be further accidents and inconveniences, we need coordination of traffic; a bystander steps forward and starts giving directions; perceiving some prospect of her directions being followed by enough drivers to avert the danger, some drivers start following them and others fall into line; all who do so are attributing to her some authority, albeit fleeting and *de facto*. Surprisingly, Smith asserts that I see here a case of *legal* authority,<sup>62</sup> But I would never think that – which is not to deny that the reasonableness of her giving directions and of others’ treating her as temporarily in charge of the situation (pending the arrival of legal empowered authorities) could and should fittingly enter, as legally decisive, into argument about someone’s criminal or civil liabilities arising out of the train of events. So my argument is not over-inclusive.<sup>63</sup>

Nor is it under-inclusive, as Smith goes on to argue. When legal authorities choose to disrupt coordination, they do so (if they are acting justly at all) with a view to establishing coordination at a higher level, for better goods, especially for more adequate justice.

That leaves Smith’s main objection, that I have the relation between effectiveness and authority backwards. For, he argues, the government is effective in securing obedience (and thus coordination) “because the citizens by and large believe it has authority. Authority... (or at least perceived authority) is a precondition for political effectiveness, not the other way round.” But this objection quite fails. My account of legal authority’s emergence and continuance is, with great emphasis, differentiated and stratified chronologically (sequentially). There is the emergence of a government’s authority in a time of troubles when government has broken down (perhaps smashed by the actions, just or unjust, of the people now claiming to be in charge). Here, where no effective legal rules identify anyone as in authority, only the prospect of efficacy in what Green calls *the task* gives people rational grounds for attributing to some persons the authority to govern and make rules of the kind we call legal in type (in scope, content, purpose, etc.). But:

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<sup>62</sup> Smith [p. 14 text and n.26].

<sup>63</sup> Pace Smith [pp. 16-17].

The effort to bring everyone to at least an acquiescence in this judgment is usually very taxing and exhausting for all concerned, and makes clear to all what is indeed the case: that those general needs of the common good which justify authority, certainly also justify and urgently demand that questions about the location of authority be answered, as soon as possible, by authority. ... there are situations where this is not practically possible, and ...the emergence of particular bearers of authority is, nevertheless, neither impossible nor unduly mysterious. ...very commonly, the first authoritative act of unauthorized bearers of authority is to lay down directions for ensuring that in future the location of authority (whether in themselves or in their successors) shall be determined, not by the hazards of these processes of arriving at unanimity from which they have just emerged as the beneficiaries, but by authoritative rules.<sup>64</sup>

In short, once the new government is effective and has had the good sense to promulgate some constitutional rules, legal authority once again becomes the normal and normative precondition for authority, a precondition which fails to hold, however, during the time of troubles when only the prospect of efficacy can ground authority.

The same differential sequencing of the efficacy-authority-efficacy relationship was also made evident in the paragraph of my essay on revolutions from which Green quotes at the outset of his paper. So I take the liberty of restoring some words and phrases (here italicized) that he left out::

[it is] normally reasonable to accept the new rules *of competence and of succession of rules* proposed by *the* successful revolutionaries who have made themselves masters of society and thus responsible for meeting the contingencies of the future. ...*this reasonableness is the reasonableness of justice and philia politike* [political friendship], *which demand legal coherence and continuity*...

These references to justice and civil friendship also suggest the nuances I would add to Green's account. His summary of my account, "effectiveness for a task" is hazardous, for it idiomatically connotes or suggests an undertaking in the fourth kind of order, of technical arts, rather than in the third, of morality, self-constitution and friendship in the open horizon of the whole of human life. Of course, the word "coordination", so

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<sup>64</sup> NLNR, 249.

prominent in *NLNR*'s account of authority, itself rather suggests the technical, although it is there defined so as to be nowhere near as technical as the artificial game-theoretical concept of a pure coordination problem.<sup>65</sup> So, as I said in my "Law as Coordination" (1989):

...the common good simply is the good of individuals living together and depending upon one another in ways that tend to favor the well-being of each.

Correspondingly, those who do have legislative or other constitutional responsibility for the common good as such, do well to regard it as quite other than a goal which could be defined and attained by skilful disposition of efficient means like a bridge or an omelet. Attempts to absorb the individual or particular groups into a vast co-ordination "solution", so as to eliminate all *private* purposes and all enterprises launched for reasons other than the advancement of the public co-ordinative scheme, confuse the idea of a national common good with the idea of a national common enterprise or scheme of co-ordination. Such attempts, indeed, thereby do grave damage to the common good. Their injustice is a reason for regarding laws made pursuant to them as morally *ultra vires* and devoid of law's generic moral authority – though not of ... possible "collateral" moral significance...<sup>66</sup>

The essential point is that the common good, for the sake of which governance should coordinate action, includes respect for rights, and includes also the Rule of Law. Neither rights nor the Rule of Law should be conceived of as mere side-constraints on the pursuit of common good. They are constituents of the common good. So the task, or better the responsibility, of new or long-established rulers is not merely to secure the elemental goods that are the objects of (say) Hart's primary rules, but also to secure the kinds of goods for which (say) Hart's remedial, secondary rules of adjudication, legislation and recognition need to be introduced and maintained. Hence the pivot that I have recalled above from the argument of *NLNR* chapter I. Hence too my sketch of the kinds of bad reason which motivate governments to resile from the Rule of Law or reduce it to a sham:

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<sup>65</sup> See *NLNR*, 255 and my reply to Green's 1983 article on these matters in my "Law as Coordination", *Ratio Juris* 2 (1989) 97-104 at 100.

<sup>66</sup> *Ibid.*, 104

The sort of regime [in question] tends to be (i) exploitative, in that the rulers are out simply for their own interests regardless of the interests of the rest of the community; or (ii) ideological, in that the rulers are pursuing a goal they consider good for their community, but pursuing it fanatically..., overlooking other basic aspects of good in community; or (iii) some admixture of exploitative and ideological, such as the Nazi regime. None of the types of tyranny can find in its objectives any rationale for adherence (other than tactical and superficial) to the disciplines of legality. For such regimes are in business for determinate results, not to help persons constitute *themselves* in community....<sup>67</sup>

And in any event, the political common good is to be conceived as public good in the limiting sense argued out in chapter VII of *Aquinas*.

## V

Mark Murphy thoughtfully debates the question how the basic human goods and the requirements of practical reasonableness are related, in my thought, to a transcendent, divine cause., the question how far the affirmability of the goods and moral requirements is “detachable” from the affirmability, if such it is, of God’s existence and nature. The question, so far as it relates to my thought, is complicated by the fact that *Natural Law & Natural Rights* takes a very austere, minimalist view of what can be affirmed on the basis of reason alone about the nature of God. The argument that we are, not logically, but rationally required to affirm the existence of a transcendent explanation/cause “which exists simply by being what it is, and which is required for the existing of any other state of affairs” is said on p. 389 to be unable, “I think”, to take us further. That God’s nature is personal, that “the uncaused cause of all the good things of this world (including our ability to understand them) is itself a good that one could love, personal in a way that one might imitate, a guide that one might follow, or a guarantor of anyone’s practical reasonableness” is said on p. 398 to be a set of propositions of which “it is impossible to have sufficient assurance...without some revelation more revealing than any that Plato or Aristotle may have experienced.” Hence the negative conclusion stated bluntly on p. 405: “...what can be established, by argumentation from the

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<sup>67</sup> NLNR, 274.

existence and general features of the world, concerning the uncaused cause of the world, does not directly assist us in answering” the practical questions set up in the chapter’s first pages -- about the possibility of a deeper explanation of obligation, the reasonableness of self-sacrifice in human friendship, “the point of living according to the requirements of practical reasonableness”,<sup>68</sup> that is, questions about “whether any *further* sense can be made of the whole situation...”<sup>69</sup> This limitation of “natural reasoning”, I added, though it “leaves somehow ‘subjective’ and ‘questionable’ the whole structure of basic principles and requirements of practical reasonableness and human flourishing...”, does not unravel that structure or affect its internal order or weaken its claim to be more reasonable than any logically possible alternative structures.”

Before saying how I think the just-mentioned negative conclusions ought to be revised, let me review the *NLNR* position. (1) The first thing to observe is that it is not at all the “secular” position attributed to me by Perry when he says:

It is a presupposition of the secular position – Finnis’s position – that *it* [the natural law] *holds even if the universe is just what Clarence Darrow and Steven Weinberg ... have proclaimed it to be: a cosmic process bereft of ultimate meaning.*<sup>70</sup>

For it is one thing to say, as I do in the section of *NLNR* headed “Natural Law and the Existence and Will of God” (sec.II.8), that the theory of natural law can be set out *without needing to advert to the question* of God’s existence or nature or will” and something quite different to say that the theory of natural law would be unaffected if reason established that there is no divine existence, nature or will and that the universe *is* bereft of ultimate meaning. To hold, as I did and do, that norms, not precisely of logic, but certainly of rationality demand that natural science’s myriad affirmations of causal explanation be under-girded by an explanation of the availability both of those explanations and of the realities they explain is to hold, by an entailment whose necessity again is that of rationality norms, that denial of that meta- or transcendent explanation unravels the rationality norms on which natural science itself depends. A good explanation of molecular motion, as I say in the same short section of *NLNR*, can be

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<sup>68</sup> *NLNR*, 405

<sup>69</sup> *NLNR*, 372.

<sup>70</sup> Perry p. 45 (his emphases).



provided “without adverting to the existence of an uncreated creator of the whole state of affairs in which molecules and their laws of motion obtain.”<sup>71</sup> But non-advertence is very different from denial. Nietzsche’s progression from denial of God’s existence (jokily or confusedly framed as “God is dead”) to denial of all metaphysical order is not unreasonable. Of course there are countless natural scientists and others who are confident in affirming the laws of their science while confidently denying that they have any divine source or at least that the affirmation of such a source rationally required. But that does not show that Nietzsche’s inference was mistaken, any more than the existence of dissent shows that the majority are wrong, or the outnumbering of the dissenters shows that they are wrong.

So too, (2) the NLNR position is not, as Murphy (p. 13) takes Leiter to be asserting, that “natural law theory [is] safe for nontheists.” No aspect of the world’s existence and multiple orders is safe for non-theists, for the affirmation of those intelligible orders, including the third-order order of moral principles,<sup>72</sup> invites the further questions pursued in chapter XIII through to the thesis that rationality norms require the abandonment of nontheism. I think Murphy’s conclusion about Leiter’s position is stated near the end of his paper, and is right:

...once he [perhaps Finnis, perhaps anyone who affirms the natural law] has raised this set of issues [about ultimate intelligibility] and decided [I would say judged] that only a theistic solution will do, he has committed himself to the position that adherence to the natural law is rationally unstable in the absence of a certain sort of theistic stance.

I agree, and would add that an analogous rational instability must, in the absence of a “theistic solution,” be attributed to the rest of human knowledge, too, by anyone who judges that the rationality norms which guide us in the acquisition of such knowledge require us also to affirm the “theistic solution”.(divine causality).

(3) Though it is not clear to me that *NLNR* ch. XIII set out to “explain the natural law,”<sup>73</sup> it is equally not clear that it fails (a) to “explain the necessary relations between universals that constitute the natural law” and (b) to show that “there is some further

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<sup>71</sup> *NLNR* 49.

<sup>72</sup> See the whole passage at *NLNR* 404 from which Murphy p. 7 at n. 15 quotes a main part.

<sup>73</sup> Murphy [p. 20, first sentence of sec. III, and p. 22]

point beyond” the basic goods, some point to “acting on [the natural law’s] categorical norms given that their status is indexed to mere human needs and interests”. For, as to (a): the necessity of the connections between the relevant universals, the principles of natural law, is the necessity of our given nature (and therefore our opportunities of flourishing) having many aspects and being instantiated in many persons, which is a necessity only because the divine creative (and unnecessitated) choice opted for this world rather than none and rather than a world containing beings of radically other nature. And as to (b): I think it is logically unsound to say that the participation of our pursuit of basic goods in the divine play gives that pursuit no added intelligibility because “if there is any trouble about ... basic goods being relative to us in some sense, the trouble should reappear here in the explanation.” For I ask myself: if the trouble about the basic goods is not about their content but about (briefly) the perishability of their instantiations in fleeting lives, why should not the recontextualisation of those instantiations in the eternal play add to the intelligibility of our willingness to make choices in line with them?<sup>74</sup>

Murphy is right that, in the end, *NLNR* does not say that the goodness of the basic goods is explained by the *goodness* of the transcendent cause. The book attributes to that cause “the perfection of being all that is required to make all states of affairs exist” (406), but declines to explore that perfection. In the book *Aquinas*, by contrast, the divine causing, shaping and sustaining of the universe is treated as explaining “the actuality, existence, specific reality, goodness and orderliness of every being without exception” (305), and the divine nature, as “pure act...free from every trace of potentiality, lack, imperfection, or need” (309), is treated as “includ[ing] ... every kind of benefit of being, every kind of power (in act, not potentiality), and every kind of perfection” (312).

On the one hand, then God cannot have chosen to create the universe to meet any need; lacking nothing, reality as a whole could not be improved by God’s choice to create. On the other hand, creating, directing, and sustaining the universe need not, and could not, have been pointless, lacking in intelligibility; like every other

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<sup>74</sup> Of course, much more intelligibility still would be added if that recontextualisation placed our instantiations of basic goods in the framework of personal immortality or resurrection, and of an eternal community in which the good deeds of this life will be “found again” (as Vatican II puts it); and about immortality and resurrection *NLNR* is silent even when it outlines “speculations and hopes” (406) well beyond natural reason.

aspect, so to speak, of the single divine act of being, the idea and act of bringing into being this universe cannot be deficient in intelligibility. [So] the point, the common good, of the universe must be the expressing, representing, and communicating (somehow sharing) of the divine perfection of actuality by bringing into being a universe of creatures which are each *like* ... God in having actuality, perfections, intelligibility, and so forth .... By [their] flourishing, creatures and systems of creatures become more similar to ... and more apt to represent... God, each in its own way; and all together they can express the inexhaustible divine perfection by their plurality and diversity,... and [by] their intelligibility each in itself and all as parts of the whole order.

To these thoughts of his, with which I fully concur in judgment, Aquinas adds that (in my close paraphrase)

This flourishing of human beings is not as *mere* parts of a system. For we are persons, and when we are functioning well we act not simply by following the dynamisms of some system whose pattern is built into us, but rather by our mastery over our own acts. By thus having an authorship of one's own life through acts of free choosing, one acts on one's own account and, in a sense, for one's own sake, and in the plan of divine creation each of is a *per se* end; the plan is directed towards one's personal flourishing, for one's own sake...<sup>75</sup> [H]uman existence, understanding, willing, and acting thus re-present and image God's actuality in a way that sub-personal creation cannot. They do so in a specially close and vivid way when they have all the practical reasonableness, all the unfettered openness to human goods, that we have traced in outline in earlier chapters.

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In the face of the often crushing calamities to which human beings are prey, one must regard the disorder as somehow within the stable and intelligible order, and abstain from judging it defective or unintelligent because one does not understand its point, lest one "resemble a country bumpkin [rusticus, idiota, ignorans] who, from the true premise that he does not understand what is going on in a busy laboratory or hospital theatre, draws the conclusion that what is going on is random, unintelligible, pointless or foolish... The intention of an intelligence capable of projecting and actualizing the entire cosmos and all its interlocking orders vast and miniscule (including human minds with all their capacities to understand and reason logically, mathematically, and interpretatively) is not an intention we could ever reasonably hope to understand *fully* by reasoning from those truths about it which... we do manage to understand." (*Aquinas*, 304..)

So I agree with what I take to be the fruit of Murphy's investigation, though I would not myself say that this explanation through participation and likeness is "through unification" or that the human goods are or are identical with "theistic facts", or that these explain human goods or "normative facts" by "the immediacy of identity." (Murphy part V).. My interest in any of the kinds of "detachability" that Murphy's exploration summoned up never went much beyond the simple thought that, as it is possible to do physics without raising or pressing further questions, so to some extent it is possible to have a practical and theoretical understanding of practical reason's principles and their implications for reasonable choice, and so for individual and communal self-constitution, without raising further or pressing questions. When setting out the short ways through *NLNR*, on the first page of its preface, I said that someone interested only in legal theory could omit chapter XIII, but not someone "interested in natural law simply as an ethics."

But I think it is important not to follow the example of Perry's "Sarah". She confronts Nietzsche without benefit of philosophy, without grappling in dialectics with his dialectic. Quoting and it seems relying on the seer who wrote the *First Epistle of John*, she affirms simply that God is love. She does not notice that in that letter, the assertion about divine love is preceded by the affirmation that God is light – both intelligibility and the blaze of glory – and that the letter presents itself as an extension of the Gospel which begins by affirming God as source of all that is, as *logos* (intelligibility and practical intellect), and, again, as glory.<sup>76</sup> The affirmation that God is love has to be earned. It might be earned by the stupendous judgments made by John and the other disciples about the divine nature of the suffering servant, and attention to the grounds of those judgments. Or it might be earned by metaphysical reflections on an implication of divine actuality and perfection: that "since God, being pure actuality, can have no lack or need of any kind whatsoever, all the good in the created universe – creatures and everything from which any creature ever benefits – must be given out of God's sheer generosity",<sup>77</sup> which is to say: out of "the liberality –that is to say, the love – by which

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<sup>76</sup> It is not the case that (as Perry n. 30 approvingly quotes John Caputo as saying) "God is love" is "as close as the New Testament [gets] to a 'definition' of God"

<sup>77</sup> *Aquinas*, 310.

God enables us (and not out of any need of his but rather for our sake) to somehow share in the goodness of his actuality.”<sup>78</sup>

And those metaphysical reflections and inferences need, I think, to begin with the reflective vindication of metaphysical order against all Nietzschean, Calliclean, and other skeptical doubts. Such order, along with order in all the other three kinds of order, can be found, for instance, in the undeniable reality that I can put questions to myself, think them through, and answer them or hold them in suspense; and can put to myself the very same question as Nietzsche or the other skeptics put to themselves, in another language and another era, in the same though altered Europe. My picking up the book to see what Nietzsche thought is an event, an element, an episode, intelligibly linked to countless others, in an indubitably metaphysical and indubitably orderly order, as well as in the orders of logic, rational choice, and technical art, the four kinds of order in which every human person’s life is lived.

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<sup>78</sup> *Aquinas*, 311. See nn. 76-78 which include a discussion of the reason for using the masculine pronoun (and implicitly for eschewing modeling creation and providence on the womb – cf. Perry p. 18).